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No. 00-24

IN THE

Supreme Court of the United States

PGA TOUR, INC.,

Petitioner,

v.

CASEY MARTIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* K-T SUPPORT GROUP IN SUPPORT OF RESPONDENT

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THE INTEREST OF THE *AMICUS CURIAE*[1]

The K-T Support Group ("Support Group") is a non-profit, tax-exempt organization incorporated under the laws of Minnesota that originated as a private, unincorporated, not-for-profit membership association in 1986. The Support Group's mission is to provide support for Klippel-Trenaunay ("K-T") Syndrome patients and their families.[2] The Support Group is an associate member of the National Organization of Rare Disorders. Among its activities, the Support Group: provides a clearinghouse for correspondence between members; maintains and makes available a list of current medical literature pertaining to K-T Syndrome; conducts bi-annual meetings of patients and families in Rochester, Minnesota, in conjunction with optional appointments at the Mayo Clinic; distributes a periodic newsletter of shared experiences; maintains an internet web page;[3] and generally acts as a support

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1. Letters from each party consenting to the filing of this brief have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part. The only entity that made a monetary contribution to the preparation or submission of this brief other than the *amicus curiae*, its members, or its counsel, was the Texas Tech Law School Foundation, which provided funds for the printing costs.

2. Respondent Casey Martin has been diagnosed with Klippel-Trenaunay-Weber Syndrome. The medical community has frequently used the terms Klippel-Trenaunay Syndrome and Klippel-Trenaunay-Weber Syndrome interchangeably. *See Description of Klippel-Trenaunay Syndrome*, <http://www.k-t.org/description.html> (also including a detailed description of the symptoms and etiology of K-T Syndrome). K-T Syndrome has been defined as "a rare congenital malformation characterized by the triad of arteriovenous or capillary vascular malformations, atypical varicosities, and bony or soft tissue hypertrophy usually affecting one extremity." Anila G. Jacob et al., *Klippel-Trenaunay Syndrome: Its Spectrum and Management*, <http://www.k-t.org/proceed.html> (discussing a Mayo Clinic study of 252 K-T Syndrome patients seen from 1956 to 1995).

3. *See K-T Support Group Home Page*, <http://www.k-t.org>.

group for sharing experiences and information about this rare disorder.[4]

The Support Group is the most knowledgeable entity in the country with respect to the extremely rare disability that affects the Respondent, Casey Martin. Although no two cases of K-T Syndrome are exactly alike, Support Group families know well the physical, emotional, and spiritual endurance and stamina required to live every day with this rare, complex, disfiguring, and often disabling condition of birth.

An inability to walk distances is frequently associated with K-T Syndrome when the condition affects the person's legs or feet. Because of a host of complicating factors — such as bone anomalies, bleeding and clotting disorders, blood pooling, poor circulation, lymphedema, and pain — many persons with K-T Syndrome, like Casey Martin, must often limit extensive walking, running, jumping, and other strenuous physical activities. Because of the availability of golf carts, however, golf is one competitive sport in which such persons can fully participate.

SUMMARY OF ARGUMENT

Put simply, this case is about discrimination. Respondent Casey Martin overwhelmingly proved to the District Court that he has a disability that affects his ability to walk, that he is capable of excellence in the sport of golf, that a modest modification — the use of a golf cart — will permit him to compete in competitions and on golf courses operated by Petitioner PGA Tour, Inc. ("PGA"), and that this modification is not a fundamental alteration of the sport. Nonetheless, the PGA wants this Court to permit it to discriminate against Casey Martin on the basis of his disability notwithstanding the ADA.

Title III of the ADA applies to the PGA in its operation of golf courses for purposes of its competitive events. This conclusion is compelled by the plain meaning of Title III which

4. Counsel for *Amicus Curiae* Support Group is a member of the Support Group and has a 9 year-old daughter who has K-T Syndrome. Counsel also is immediate past chair of the State Bar of Texas Disability Issues Committee.

precludes discrimination against an "individual . . . on the basis of disability" by any person who "operates a place of public accommodation" with respect to the "full and equal enjoyment of . . . the services, facilities, privileges, advantages, or accommodations" of the "place of public accommodation." 42 U.S.C. § 12182(a). Title III also *specifically* defines "discrimination" to include the "failure to make reasonable modifications in policies, practices, or procedures . . . to individuals with disabilities" absent a demonstration by the public accommodation that such modifications would "fundamentally alter the nature" of the public accommodation. *Id.* § 12182(b)(2)(A)(ii). The statute specifically lists a "golf course" as a place of public accommodation (*id.* § 12181(7)(L)); thus, owners and operators of golf courses are covered by Title III. Alternatively, the PGA operates places of "exhibition or entertainment," which are also covered by Title III. *Id.* § 12181(7)(C).

Despite this explicit coverage in the statute, the PGA has urged this Court to find that because Martin can earn prize money in PGA events, his claim is more of a Title I employment action rather than a matter covered by Title III. This argument is specious. The list of public accommodations covered by Title III is extensive. Many owners and operators of public accommodations owe duties to employees under Title I *and* members of the public under Title III. Some of these members of the public — for example, guest lecturers or entertainers at a private college — might also be paid by the public accommodation. Title III requires that they have reasonable access to the college's performing areas. Similarly, many small employers with fewer than 15 employees have no Title I obligations, but must comply with Title III in providing access to people with disabilities. In sum, the PGA continues in its quest to bifurcate the golf course into zones admittedly covered by Title III (for the gallery of fans) and playing areas within the place of public accommodation that are purportedly exempt. In this, the PGA misconstrues Title III. The ADA was not intended

solely to increase access for persons with disabilities to *attend* places of public accommodation as spectators; it also speaks to *participation* in public accommodations by persons with disabilities. A decision that Title III does not reach the playing areas during PGA events would allow the PGA to discriminate at will against all persons with disabilities who are otherwise qualified to compete, to serve as caddies, to serve as scorekeepers or in any other position ordinarily found "within the gallery ropes."

The lower courts also correctly found — in light of Casey Martin's disability — that *his* use of a golf cart is a reasonable modification that does not fundamentally alter the sport of pro golf. The PGA has conceded that Martin has a disability that is covered by the ADA. Nonetheless, despite Title III's requirements, the PGA adamantly refused to make any type of individualized inquiry about Martin's specific condition or how his request for a cart related to his disability. Given that a golf cart is a reasonable modification to accommodate Martin's disability, the PGA had the burden of demonstrating that Martin's cart use would fundamentally alter the nature of the public accommodation. The PGA did not meet that burden.

The game of golf, even at its most prestigious levels, is all about shot-making and getting the ball from the tee to the green, and then into the hole in the fewest strokes. It is not about walking, and it's not about how one gets from one shot to the next. Even the PGA has allowed cart use for all golfers in its Senior Tour and in portions of its Qualifying Tournament. Martin's use of a cart for moving about the course does not alter the competition at all — much less in some fundamental way. Martin did not request to get a "head start" on each hole by teeing his ball from a different spot from other competitors, and he did not ask to throw the ball instead of striking it with a club. He wants to compete in a sport in which he has mastered the primary and fundamental skills: striking and putting a golf ball with a minimum of strokes. Although the District Court recognized that walking injects some fatigue into the game, the

PGA has largely ignored the findings, entered after a six-day trial, that Martin's fatigue and pain, even with cart use, is greater than other able-bodied competitors. In sum, because of his disability, Martin cannot walk the full course. Allowing him to ride a cart is a simple accommodation for *his individual* disability, and it allows him a chance to compete on a level playing field. It provides no advantage; it just gives him the type of opportunity that the ADA is all about.

ARGUMENT

I. THE LOWER COURTS CORRECTLY HELD THAT TITLE III OF THE ADA APPLIES TO THE PGA BECAUSE IT OWNS, LEASES, AND OPERATES PLACES OF PUBLIC ACCOMMODATION.

A. Title III Plainly Applies to the PGA.

A statute must be accorded its plain meaning. In the context of the ADA, this Court unanimously determined that notwithstanding contentions

> that Congress did not "envisio[n] that the ADA would be applied to [the matter under review]," in the context of *an unambiguous statutory text* that is *irrelevant*. . . . [T]he fact that a statute can be " 'applied in situations not expressly anticipated by Congress does *not demonstrate ambiguity. It demonstrates breadth.*' "

Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 212 (1998) (citations omitted) (emphasis added).

Title III of the ADA provides that "[n]o *individual* shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation." 42 U.S.C. § 12182(a) (emphasis added). In turn, the statute *specifically prohibits* and defines as "discrimination" the failure by a private entity that owns, leases, or operates places of public accommodation "to make reasonable modifications in policies, practices, or procedures, when such

modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities" unless the private entity "demonstrates" that "making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations." *Id.* § 12182(b)(2)(A)(ii).

Moreover, Title III expansively defines "public accommodation" to include twelve categories of private entities and specifically identifies "a gymnasium, health spa, bowling alley, *golf course*, or other place of exercise or recreation." *Id.* § 12181(7)(L) (emphasis added). As the Ninth Circuit observed, "There is nothing ambiguous about this provision; golf courses are public accommodations." *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 997 (9th Cir.), *cert. granted*, 121 S. Ct. 30 (2000). As an owner or operator of golf courses, the PGA is plainly covered by Title III.

As it did below, the PGA has continued to attempt to give the definition in section 12181(7)(L) a narrow reading by urging that the act only reaches golf courses when they are being used as places of exercise or recreation. As held by the Court of Appeals, this is not controlling:

> Even if we were to agree with this point, it would not aid PGA. The statute also defines 'public accommodation' to include a "theater, . . . stadium or other place of exhibition or entertainment." 42 U.S.C. § 12181(7)(C). If a golf course during a tournament is not a place of exercise or recreation, then it is a place of exhibition or entertainment.

Martin, 204 F.3d at 997. Indeed, under the implementing regulations, a "place of public accommodation" is defined as a facility that "fall[s] within at least one of the . . . [twelve] categories." 28 C.F.R. § 36.104 (1999).[5] Congress has plainly

5. There was no intent for the language, "other place of exercise or recreation," to be limiting. Instead, for each of the twelve categories (Cont'd)

addressed a wide variety of covered *places*, and the language in § 12181(7) does not purport to create exceptions for particular *uses* within those places.

In the courts below, as well as here, the PGA has attempted to create an artificial distinction between those parts of the golf course that are set up for spectators during its tournaments ("outside the ropes"), and the course's playing areas ("inside the ropes").[6] In this regard, the PGA likens the area outside the ropes to the seating area in a stadium or auditorium and suggests that Title III applies only to spectator areas, not places "inside the ropes" that are for competitors. This is a mistaken view of the ADA. The PGA has invited members of the public to qualify to play golf and compete on the golf courses it operates. As the Ninth Circuit stated with regard to the contention that the "golf course" during PGA tournaments is more like a place of exhibition or entertainment, "The statute does not restrict this definition to those portions of the place of exhibition that are open to the general public." *Martin*, 204 F.3d at 997. Although

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of public accommodations, "the legislation only lists a few examples and then, in most cases, adds the phrase 'other similar' entities." STAFF OF HOUSE COMM. ON EDUC. & LABOR, 101ST CONG., LEGIS. HISTORY OF P.L. 101-336, at 157 (Comm. Print 102-A) (from Senate Report). Congress intended "that the 'other similar' terminology should be construed liberally." *Id.* The ADA's history reveals further that the intent in subsection (7)(L) was to cover a broad spectrum of "other similar establishments" such as "[t]ennis courts, basketball courts, dance halls, playgrounds, . . . aerobics facilities, . . . video arcades, swimming pools, beaches, camping areas, fishing and boating facilities, and amusement parks." *Id.* Indeed, the drafters of the ADA intended to expand significantly from the public accommodations covered under the Civil Rights Act of 1964 (limited to lodging, eating, and entertainment). *See* NATIONAL COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT, at 101-02 (1997).

6. At the District Court the PGA urged that is was *fully* exempt from the ADA under the exception for private clubs. The District Court properly rejected that argument, and the PGA did not appeal that ruling. *Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320, 1323-26 (D. Oregon 1998).

the PGA would like this Court to so believe, 42 U.S.C. § 12181(7)(C) does not say, "limited to spectator areas." Of note, even the District Court in *Olinger* did not disagree with this viewpoint, and the Seventh Circuit did not disturb that holding. *See Olinger v. U.S. Golf Ass'n*, 55 F. Supp. 2d 926, 932 (N.D. Ind. 1999) ("ADA applies to the areas of competition . . . as well as to the gallery and the areas outside the ropes"), *aff'd*, 205 F.3d 1001, 1004 (7th Cir.) (not resolving Title III issue, but accepting USGA's "fundamental alteration" argument), *petition for cert. filed* (Sep. 20, 2000) (No. 00-434).

B. The PGA's Attempts to Narrow the Scope of Title III Lack Legal Support.

In this appeal, Petitioner has for the first time argued that the Respondent cannot seek relief under Title III of the ADA because Respondent hopes to play well and win prize money at PGA events. In essence, the PGA appears to be asserting that because Martin can earn prize money in PGA events, his claim is more of a Title I employment action rather than a matter covered by Title III. In addition, the PGA is now urging for the first time that all of the prohibitions included in Title III apply only to "clients and customers" of public accommodations. First, these arguments were neither briefed nor argued below and, accordingly, the Ninth Circuit did not address them. *See Yeskey*, 524 U.S. at 212-13 (observing in another ADA case that when an issue has neither been raised before nor considered by the Court of Appeals, then the Court "will not ordinarily consider" it). Even should the Court consider the arguments, however, they are without merit.

The District Court determined that Title I is inapplicable in this case given its holding that Martin is not a PGA employee. Indeed, the PGA has taken substantial steps to structure its business to avoid having its players be considered as employees. It does not follow, however, that Title III does not protect anyone who receives prize money or compensation from an operator of a public accommodation. The list of places and types of public accommodation included in Title III is extensive. And, Congress

has forbidden discrimination against "individuals" with disabilities at public accommodations. For example, a "private school" or the operator of an "auditorium," "lecture hall," or "concert hall" might hire a guest lecturer, entertainer, or other performer with a disability and pay that individual as an "independent contractor." *See* 42 U.S.C. §§ 12181(7)(C), (D), & (J). The PGA would have this Court hold that although attendees are covered by Title III, the speaker or performer would not be.

Similarly, a small law firm of less than 15 employees is exempt from Title I's employment provisions, but is still subject to Title III as a public accommodation. *Id.* § 12181(7)(F). The PGA's construction of Title III would limit the statute's applicability only to the firm's clients. This construction, however, excises any obligation to a myriad of other individuals who are not "clients or customers" of the firm who will need access to the firm's offices on any given day. These might include a person with a disability who is an opposing counsel, an expert witness, court reporter, jury consultant, mediator, messenger, or office equipment repairman. Indeed, many of these persons are non-employees who receive compensation from the firm. Similarly, a large law firm will have Title I obligations in its hiring practices and policies, and will have Title III obligations to a comparable list of persons.

Another example worth considering is a private college. It has Title I obligations to its employees, but also Title III obligations (*Id.* § 12181(7)(J)) to its students *and* a host of other non-employee individuals invited onto the campus, many of whom it might pay for services rendered. Just to name a few, those protected could include individuals with disabilities who are guest lecturers, entertainers, artists, accreditation officials, alumni, consultants, and student athletes from other schools or sports officials needing access to locker rooms and playing fields.[7]

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7. Similarly, a bank examiner with a disability must have access within a bank (*Id.* § 12181(7)(F)); a delivery person with a disability

(Cont'd)

The PGA would also like this Court to hold that Congress intended Title III to apply only to "clients or customers" of public accommodations. Although that language appears in Title III, the PGA's argument overextends its reach. Title III first sets forth a *broad* general rule that an "individual" shall not "be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . . ." 42 U.S.C. § 12182(a). Subsection (b) of the statute is entitled, "Construction," and includes "General prohibitions" in subsection (b)(1) and "Specific prohibitions" in subsection (b)(2). The general prohibitions make certain proscribed activities such as "denial of participation," "participation in an unequal benefit," and provision of a "separate benefit" discriminatory if directed to "an individual or class of individuals on the basis of a disability" either "directly, or through contractual, licensing, or other arrangements." *Id.* §§ 12182(b)(1)(A)(i)-(iii). In turn, § 12182(b)(1)(A)(iv) states that "[f]or purposes of clauses (i) through (iii) of this subparagraph, the term 'individual or class of individuals' refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement." This subsection, however, does *not* purport to narrow the term "individual" as set forth in the general rule in § 12182(a).

The statute also sets forth in § 12182(b)(2) an array of "specific prohibitions" including the provision at the heart of this litigation, which makes it discriminatory for a public

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(Cont'd)
should be able to access a bakery, grocery store, clothing store, or shopping center (*Id.* § 12181(7)(E)); and a non-employee doctor with a disability must have access in a hospital (*Id.* § 12181(7)(F)). *See Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113, 123 (3d Cir. 1998). None of these individuals would likely be viewed as clients or customers. Also, would the PGA's construction eliminate Title III applicability to scholarship students at the private college? After all, they are being paid to participate.

accommodation to fail "to make reasonable modifications" in its "policies, practices, or procedures, when such modifications are necessary to afford such . . . facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate" a fundamental alteration. *Id.* § 12182(b)(2)(A)(ii). The "specific prohibitions" of § 12182(b)(2) simply do not include the "clients or customers" language set forth in one subpart of the "general prohibitions" of § 12182(b)(1)(A).

Also, as illustrated by the many examples set forth above, the PGA's attempt to narrow the applicability of Title III solely to "clients or customers" of all public accommodations listed at length in § 12181(7) defies common sense. Many people with disabilities visit or participate in the vast array of places of public accommodation included in § 12181(7) who cannot be viewed as "clients or customers." What, then, did Congress intend when it included this apparent limitation in § 12182(b)(1)(A)(iv)? The legislative history reveals that Congress was not focusing on the "clients or customers" aspect of the subpart in question, but instead was concerned that a public accommodation might try to contract away its ADA obligations. As stated in the House Report:

> The intent . . . is to prohibit a public accommodation from *doing indirectly through a contractual relationship*, what it *may not do directly*. Thus, the 'individual or class of individuals' referenced . . . has always been intended to refer to the clients or customers of the public accommodation that entered into a *contractual relationship*. The section has never been intended to encompass the clients or customers of *other* entities. Thus, a public accommodation is not liable under this provision for discrimination that may be practiced by those with whom it *has a contractual relationship*, when that discrimination is not directed against its own clients or customers.

H.R. Rep. No. 101-485, pt. 2, at 101 (1990), *reprinted in* 1990 U.S.C.C.A.N. 384 (emphasis added). Thus, suppose that Mr. Martin plays a practice round of golf at a course several weeks before a PGA event. Under Title III, the owner of the golf course would be required to accommodate Martin's disability by letting him use a golf cart. In turn, the focus of this subsection would be relevant to the course owner's continuing obligations — or lack thereof — once the PGA, through its contract or arrangement with the owner, begins to operate the golf course for its event. The narrowing language in § 12182(b)(1)(A)(iv) would come into play. Nothing, however, in the legislative history suggests that Congress was otherwise intending to limit the entire scope of either Title III's general rule against discrimination by public accommodations or the specific prohibitions of § 12182(b)(2). The ADA is a remedial statute, and the PGA's attempt to cobble together a broad limitation from a circumscribed definition is unpersuasive.[8]

The PGA is also continuing to rely on its premise that a golf course is no longer a golf course during its competition events.[9] Instead, the PGA asserts that it is supplying

8. Moreover, even under the PGA's tortured reading of the statute, Mr. Martin is arguably a "customer" of the PGA's services, facilities, privileges, advantages, and accommodations in that he is a member of the public who was invited to qualify and participate in the PGA's golf course events.

9. Given that the golf courses are still being used as golf courses during PGA events, that argument is dubious. If an operator were to contract with a golf course owner to use the course for an outdoor concert or a private reunion, such an argument might be more compelling. The PGA also appears to suggest that Title III cannot extend to golf courses it operates because they are the players' "work areas." Interestingly, even Title III's implementing regulations contemplate accessibility in "work areas" in places of public accommodation. The regulation covering construction and alterations of places of public accommodation addresses "the usability of or access to an area of a facility that contains a primary function." 28 C.F.R. § 36.403(a) (1999). In turn, "[a]reas that contain a primary function include, but are not limited to, . . . offices

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entertainment through its "independent contractor" golfers. Thus, the PGA essentially concedes that it is covered by Title III as a "place of exhibition or entertainment." *Id.* § 12181(7)(C). Nonetheless, the PGA appears to be of the view that if it is operating a "place of exhibition or entertainment," then the playing areas or performing areas are altogether exempt from the scope of Title III. That is not the law.

Title III was not intended solely to increase access for persons with disabilities to *attend* places of public accommodation; it also addresses *participation* in public accommodations. In enacting the ADA, Congress found that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis . . . ." *Id.* § 12101(a)(9).[10] Title III identifies as discriminatory "a denial of the opportunity" for a person with a disability "to *participate in* or benefit from the . . . facilities, privileges, advantages, or accommodations" of the covered entity. *Id.* § 12182(b)(1)(A)(i) (emphasis added). During the legislative process, Congress took note of then-Attorney General Thornburgh's testimony "that we must bring Americans with disabilities into the mainstream

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and other work areas in which the activities of the public accommodation or other private entity using the facility are carried out." *Id.* § 36.403(b). The Justice Department has commented on the overlap with Title I:

> Some commentators asserted that questions relating to new construction and alterations of work areas should be addressed by the EEOC under Title I, as employment concerns. However, the legislative history of the statute clearly indicates that the new construction and alterations requirements of Title III were intended to ensure accessibility of new facilities to all individuals . . . .

28 C.F.R. pt. 36, App. B, § 36.401 (Dep't of Justice Interpretive Guidance).

10. This Court has embraced certain of these Congressional findings in prior decisions. *See Olmstead v. L.C.*, 527 U.S. 581, 588-89 (1999) (findings (a)(2), (3), & (5)); *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 801 (1999) (findings (a)(8) & (9)).

of society 'in other words, *full participation in* and access to all aspects of society.' " STAFF OF HOUSE COMM. ON EDUC. & LABOR, 101ST CONG., LEGIS. HISTORY OF P.L. 101-336, at 308 (Comm. Print 102-A) (from House Report) (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. 267, 317. In the ADA Congress also responded to testimony that identified discrimination in "the failure to make reasonable modifications in policies to allow *participation*" by people with disabilities, and observed that "it can constitute a violation [of Title III] to impose criteria that limit the *participation* of people with disabilities." *Id.* at 309, 378 (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. at 319, 388. *See also Menkowitz*, 154 F.3d at 122 (3d Cir. 1998) (holding that Title III covers a non-employee doctor with a disability in seeking staff privileges at a hospital).[11]

The PGA has insisted throughout this litigation that Title III applies only to the seating areas of sports arenas, but not to the areas "between the bleachers" or "inside the ropes." The District Court rejected this contention by observing that a disabled manager of a visiting professional baseball team would have to be accommodated in accessing the dugout. *Martin*, 984 F. Supp. at 1327. Other lower courts have had a similar view.

11. There is also nothing in the legislative history to suggest that Congress intended to exempt the sports world from the general application of Title III. Indeed, one of the original bill sponsors provided the following testimony:

> Society has neglected to challenge itself and its misconceptions about people with disabilities. When people don't see the disabled among our co-workers, or on the bus, or at the *sports field*, or in a movie theater, most Americans think it's because they can't. It's time to break this myth. The real reason people don't see the disabled among their co-workers, or on the bus, or at the *sports field*, or in a movie theater is because of barriers and discrimination. Nothing more.

STAFF OF HOUSE COMM. ON EDUC. & LABOR, 101ST CONG., LEGIS. HISTORY OF P.L. 101-336, at 943 (Comm. Print 102-B) (emphasis added) (statement of former House Majority Whip Tony Coehlo, who also revealed his own epilepsy).

For example, in *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342, 345 (D. Ariz. 1992), the court made no distinction between the playing field and seating area in finding a policy limiting coaches in wheelchairs to the dugout — and not on the field in the coach's box — to violate Title III. *See also Olinger*, 55 F. Supp. 2d at 932, *aff'd*, 205 F.3d at 1004 ("ADA applies to the areas of competition . . . as well as to the gallery and the areas outside the ropes").

Other examples point out the fallacy of the PGA's attempt to exempt from the ADA all non-public portions of otherwise covered places of public accommodations. Private auditoriums, concert halls, convention centers, and lecture halls are all covered places of public accommodation. 42 U.S.C. §§ 12181(7)(C)-(D). Under the PGA's strained line of reasoning, only the areas of public seating in such facilities would be subject to Title III given that the general public is ordinarily not invited to be at the lectern or on stage for speeches or performances. But, suppose that a featured seminar speaker has a disability and is in a wheelchair,[12] or an accomplished violinist such as Itzhak Perlman must make use of crutches.[13] Or, consider a symphony that holds auditions open to the public or sponsors a music competition — may it bar access to performing areas for the *next* Itzhak Perlman? Clearly, Title III requires the facilities to make the speaking areas or performing areas accessible. Indeed, the implementing regulations require access to "performing areas" in assembly facilities. *See* 28 C.F.R. pt. 36, App. A, §§ 4.33.5 & 4.1.3(5)(Exc. 4)(a) (1999). Section 4.33.5 provides plainly that "[a]n accessible route shall connect wheelchair seating locations with performing areas, including stages, arena

12. For example, Texas Supreme Court Justice Greg Abbott must use a wheelchair for his disability; he is a frequent speaker throughout Texas.

13. Mr. Perlman contracted polio as a child, and his legs became paralyzed. He performs while seated. "Perlman actively promotes laws to ease the access of disabled persons to buildings and transportation." WORLD BOOK, *Itzhak Perlman*, *available at* <http:/www.worldbook.com/fun/wbla/israel50/html/ldrperl.htm>.

floors, dressing rooms, locker rooms, and other spaces used by performers." This regulation mirrors identical language that has long been part of the implementing regulations for the Rehabilitation Act. *See* 36 C.F.R. § 1190.31(s)(3) (1999). Given Congress' intent that the standards applicable under the Rehabilitation Act be carried forward into the ADA (42 U.S.C. § 12201(a)), it is evident that Congress did not intend to exclude performing or playing areas from its detailed list of covered places of public accommodations. *See also Bragdon v. Abbott*, 524 U.S. 624, 632 (1999) (this Court is required "to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act").

This Court has deferred to the Justice Department's views on Title III issues and given weight to that agency's "administrative guidance" through implementing regulations, technical assistance, and statutory authority "to enforce Title III in court." *Id.* at 646. With regard to performing areas, the Justice Department's Civil Rights Division (Disability Rights Section) has issued a policy statement regarding ADA requirements for the construction of sports stadiums. That guide not only addresses accessible seating, but also requires accessible routes that "connect the wheelchair seating locations with the stage(s), performing areas, arena or stadium floor, dressing or locker rooms, and other spaces used by performers." U.S. Dep't of Justice, *Accessible Stadiums*, at 2, *available at* <http://www.usdoj.gov/crt/ada/stadium.pdf>. The policy statement specifically addresses access to playing fields, lockers, and spaces used by players and performers. *Id.* at 3.[14] Indeed, the policy requires an accessible route for "the playing fields, locker rooms, dugouts, stages, swimming pools, and warm-up areas" to "provide[ ] access for the *public, employees, and*

14. In 1996 the Justice Department communicated these guidelines to Major League Baseball with respect to stadium construction for both major league and minor league stadiums. Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Allan L. Selig, Acting Commissioner of Baseball (Oct. 22, 1996), *available at* <http://www.usdoj.gov/crt/foia/cltr196.txt>.

athletes using the facility." *Id.* (emphasis added). In this regard, the United States reached a settlement with the Atlanta Committee for the Olympic Games regarding an ADA dispute concerning construction of the Olympic Stadium. In addition to provisions regarding seating areas, the agreement addressed accessibility for the dugouts, locker rooms, dressing rooms, and accessible routes to each dugout from the playing field. *See* Settlement Agreement Concerning the Olympic Stadium, *available at* <http://www.usdoj.gov/crt/ada/stadiumo.htm> (May 15, 1996).[15]

The PGA appears to believe that persons with disabilities can have no place in so-called "elite" sports events. However, other professional sports leagues have had a more accommodating attitude. For example, Jim Abbott, who was born without a right hand, was able to pitch for many years for the New York Yankees and Anaheim Angels. Indeed, Mr. Abbott has indicated that the American League adjusted its rules for him:

> It allowed me to spin the ball even though the strictest interpretation of the rules state that a pitcher must remain completely still before his delivery. But

15. Similarly, the Recreation Access Advisory Committee of the U.S. Architectural and Transportation Barriers Compliance Board has issued advisory guidelines for sports facilities that include recommendations for access to such places as dugouts and the field-of-play. *See* Recreation Advisory Committee, *Recommendations for Accessibility Guidelines: Recreational Facilities and Outdoor Developed Areas*, at 3, 6 (July 1994) (developed for U.S. Arch. and Transp. Barriers Compliance Board). The Committee's advisory guidelines for new golf course construction "have as an underlying premise that the game of golf played by persons with disabilities *will be via the use of a golf car or similar means of mobility*." *See id.* at 106 (emphasis added) (also declaring that "it is *unrealistic to believe* that persons with severe mobility impairments will be able to play a round of golf via manual ambulation"). *See also Sutton v. United Airlines*, 527 U.S. 471, 479 (1999) (42 U.S.C. § 12204 grants "authority to the Architectural and Transportation Barriers Compliance Board to issue minimum guidelines to supplement the existing Minimum Guidelines and Requirements for Accessible Design").

> since I couldn't keep the ball in my glove — I had to switch the glove to my left hand immediately after I finished my release to the plate — baseball made an exception.

Jim Abbott, *It's Easy to Accommodate*, GOLF WORLD, Feb. 20, 1998, at 92. Similarly, Kenny Walker, who is deaf, enjoyed success with the Denver Broncos in the National Football League "often while using a sign language interpreter on the sidelines." Ted Curtis, *"Cart" Blanche*, ABA JOURNAL, April 1998, at 34. Tom Dempsey, a former kicker for the New Orleans Saints who still shares the record for the longest field goal in the National Football League, was allowed to wear a special shoe to accommodate his disabled foot.[16] Additionally, the National Basketball Association welcomed Magic Johnson back to the sport after he revealed his HIV status. Although Title I would address the employer teams' responsibilities to such players, opposing teams' stadiums and facilities must be accessible per Title III.

Indeed, Title III's general rule is broad and sweeping. At the collegiate level, some courts have recognized Title III's applicability to the governing body, the NCAA, as an operator of places of public accommodations. *See Tatum v. NCAA*, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998); *Ganden v. NCAA*, 1996 WL 680000, at *9-11 (N.D. Ill. 1996); *Bowers v. NCAA*, 9 F. Supp. 2d 460, 485-90 (D.N.J. 1998) (denying NCAA motion for summary judgment). The NCAA, of course, operates "elite" national championships, including men's and women's golf championships. Indeed, the NCAA permitted Martin the use of a golf cart in its events that determined the collegiate national champions.[17]

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16. *See* Murray Chass, *Pro Football: 63-Yard Field Goal*, N.Y. TIMES, Nov. 9, 1970, *reprinted in* 1 N.Y. TIMES ENCYCLOPEDIA OF SPORTS 149-50 (Gene Brown ed. 1979) (describing record kick and special kicking shoe allowed for Dempsey, who "was born with half a right foot").

17. The 1999 NCAA Men's Golf Championship was held at Hazeltine National Golf Club in Chaska, Minnesota. That same course (Cont'd)

Many other people participate "inside the ropes" of sporting events in addition to the players. For example, in professional football it is not unusual, and even expected, for one to see coaches, managers, referees, trainers, and even team owners in the area not open to the general public. And, this list does not begin to include the array of band members, cheerleaders, photographers, and members of the press who are a regular part of every game. Given the PGA's analysis, Title III would not be applicable to any such persons with disabilities.[18] Alternatively, if the PGA's strained attempt to convert this case into an employment scenario were accepted, others "inside the ropes" such as caddies, volunteers, marshals, and even amateur competitors invited to participate perhaps would be protected, but not Martin or other competitors. Congress did not intend to create such a patchwork of discrimination protection. And, at its most basic level, this case is about *discrimination*. The PGA has chosen to discriminate against Casey Martin because of his disability. If the PGA's approach to Title III is sustained, the PGA *could* adopt rules to preclude persons with visual disabilities from playing the game; it *could* exclude golfers with

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hosted the United States Open (conducted by *Amicus Curiae* USGA) in both 1991 and 1970. Surely the *same* golf course cannot be fully covered by Title III when operated by the NCAA for its collegiate national championship, yet not covered when operated by the USGA for its national championship.

18. *Cf.* Sue Anne Pressley, *A "Safety Blitz; Texas Cheerleader Loses Status After Others' Parents Complain*, WASHINGTON POST, Nov. 12, 1996, at A1 (discussing issues regarding removal from cheerleading squad of a Texas high school cheerleader born with cerebral palsy who uses a wheelchair). Also, at the District Court, counsel for the PGA "categorically" asserted that a "handicapped caddie would not have to be accommodated" because the tournament playing area "is not a place of public accommodation where the handicapped caddie is. It is not an area that is open to the general public." Resp. Br. in Opp. Appendix A at 3a.

epilepsy; it *could* bar deaf golfers.[19] Title III, however, applies to the PGA as it operates its golf tournaments on golf courses, and discrimination because of disability is unwarranted and unlawful.

II. THE LOWER COURTS CORRECTLY FOUND THAT PERMITTING CASEY MARTIN TO USE A GOLF CART IN PGA EVENTS IS A REASONABLE MODIFICATION THAT DOES NOT FUNDAMENTALLY ALTER THE GAME OF GOLF OR PGA COMPETITIONS.

Title III prohibits the "failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford . . . services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such . . . services, facilities, privileges, advantages, or accommodations." 42 U.S.C. § 12182(b)(2)(A)(ii). On its face, this statute plainly places the burden of demonstrating fundamental alteration on the public accommodation, here the PGA. With respect to allocating the burdens of proof, the courts below relied on *Johnson v. Gambrinus Co./Spoetzel Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997) (holding that a brewery's refusal to allow a blind individual to take his guide dog on a tour of the brewery violated Title III despite the brewery's blanket "no animals" policy). Under *Johnson*, the Title III plaintiff, once having

19. For example, the PGA could assert that such a rule would be "substantive" in that a deaf golfer would have an advantage in not being distracted by crowd noise. University of Louisville Law School Dean Laura Rothstein, the author of a treatise and a casebook on the ADA, has queried "whether the PGA would be likely to claim that it is not a public accommodation if Tiger Woods was not allowed to play and brought a race discrimination case." Laura F. Rothstein, TEACHER'S MANUAL, DISABILITY LAW: CASES, MATERIALS, PROBLEMS, at 49 (2d ed. 1998). She adds that "[w]hile the term 'public accommodation' is defined differently in different contexts, surely the intent of applicability of civil rights statutes is the same." *Id.*

established a disability, must prove that "a modification was requested and that the requested modification is . . . reasonable in the general sense, that is, reasonable in the run of cases." *Id.* Upon such a showing, then "the defendant must make the requested modification unless the defendant pleads and meets its burden of proving that the requested modification would fundamentally alter the nature of the public accommodation." *Id.* Moreover, *Johnson* stresses that the defendant's burden regarding an alleged fundamental alteration must "focus[ ] on the *specifics of the plaintiff's or defendant's circumstances* and not on the general nature of the accommodation." *Id.* at 1060 (emphasis added). In applying this analysis, the District Court found and the Ninth Circuit affirmed that providing Martin a cart did not fundamentally alter PGA golf events.

What did Congress intend with respect to the "fundamental alteration" exception? The PGA is correct that Title III's "fundamental alteration" exception derived from this Court's opinion in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (construing Section 504 of the Rehabilitation Act). It is useful, therefore, to contrast the facts in *Davis* to those now before the Court. In *Davis*, a nursing student had a serious hearing disability. The Court determined that the college would have to make substantial curricular changes to its program to accommodate her. As the Court stated:

> In light of respondent's inability to function in clinical courses without close supervision, Southeastern . . . could allow her to take only academic classes. Whatever benefits respondent might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives. Such a fundamental alteration in the nature of a program is far more than the 'modification' the regulation requires.

Id. at 409-10. The Court was concerned about requirements for "substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified

individuals." *Id.* at 410. The "substantial adjustments" at stake in *Davis* related to a critical part of nursing training — the clinical instruction component. Moreover, the clinical training related to patient safety.[20] In contrast, in this case the modification sought by Martin is a form of transport to and from his shots in professional golf. No safety issues are at stake in any way, and the differences in impact between the facts here and those of *Davis* are striking. Also, and importantly, in *Davis* the Court recognized that "[t]echnological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them . . . ." *Id.* at 412.

Although the PGA has conceded that Mr. Martin's K-T Syndrome is a disability covered by the ADA, it has never made an individualized inquiry about his specific condition or need for the requested modification. There is ample support for the requirement that an individualized assessment *must* be undertaken. *See School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 287 (1987) (calling for individualized inquiries with appropriate findings of fact in Rehabilitation Act cases; viewing same as "essential").[21] The legislative history is also

20. The Court noted, "In effect, it [Southeastern] seeks to ensure that no graduate will pose a danger to the public in any professional role in which he or she might be cast." *Id.* at 413 n.12.

21. *See Washington v. Indiana High School Athletic* Ass'n, 181 F.3d 840, 851 (7th Cir.), *cert. denied*, 120 S. Ct. 579 (1999) (following *Arline* to require an individualized approach; also, construing *Arline* to require "that some exceptions ought to be made to general requirements to allow opportunities" for persons with disabilities, and "to focus on the general purposes behind a rule without considering the effect [of] an exception for a disabled individual . . . would negate the reason for requiring reasonable exceptions"); *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1995) ("the determination of what constitutes reasonable modification is highly fact specific, requiring case-by-case inquiry"); *Anderson*, 794 F. Supp. at 345 (invalidating application of Little League's blanket rule banning coaches in wheelchairs from the coach's box where no individualized assessment was conducted); *cf. Sutton*, 527 U.S. at

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instructive on this point. During the legislative process, Congress observed that "public accommodations are required to make decisions *based on facts applicable to individuals* and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do." STAFF OF HOUSE COMM. ON EDUC. & LABOR, 101ST CONG., LEGIS. HISTORY OF P.L. 101-336, at 375 (Comm. Print 102-A) (from House Report) (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. at 385. That view is emphasized repeatedly in the Congressional findings set forth in the ADA. 42 U.S.C. § 12101(a).[22] In subsequent application, the Justice Department and NCAA entered into a consent decree in the U.S. District Court for the District of Columbia in which the NCAA agreed to conduct *individualized* waiver determinations for students with learning disabilities who do not meet NCAA initial-eligibility standards. *See* NCAA Consent Decree, *available at* <http://www.usdoj.gov/crt/ada/ncaa.htm> (May 26, 1998).

The PGA has not met its statutory burden of demonstrating that allowing Mr. Martin to use a cart as an accommodation for his disability fundamentally alters the game of golf as it is played in PGA events. The game is defined as "playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the Rules." Rules of Golf, Rule 1-1, *available at* <http://www.usga.org/rules/rule_2000/index.html>. Nothing in the rules of the game requires walking. The "walking rule" was added by the PGA, but not even for all its events. As found by the District Court, there are exceptions for the Senior PGA

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483 ("whether a person has a disability under the ADA is an individualized inquiry"); *Bragdon*, 524 U.S. at 657 (Rehnquist, Ch. J., concurring in judgment and dissenting in part) ("individualized inquiry");

22. For example, Congress found that "forms of discrimination against *individuals* with disabilities continue to be a serious and pervasive social problem"; "discrimination against *individuals* with disabilities persists in such critical areas as . . . public accommodations"; and that "*individuals* with disabilities continually encounter various forms of discrimination, including . . . failure to make modifications to existing facilities and practices." *Id.* §§ (a)(2), (3), & (5).

Tour (golfers over 50) as well as the first two stages of the PGA's Qualifying School Tournament. *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1248 n.9 (D. Or. 1998). The PGA imposes no penalty strokes on those who opt to use carts in such events. *Id.* at 1248. As best-selling sports author John Feinstein has written, "If being fifty [i]s enough of a handicap to be allowed a cart, then a disease like this one [i]s surely worthy of an exception to the no-cart rule." JOHN FEINSTEIN, THE MAJORS 221 (1999).[23]

The game of golf is about shot-making. Golf, even PGA-level competition, is not a contest in which speed, mobility, size, or quickness is essential (in contrast to sports like tennis, soccer, basketball, football, and running). The lowest score wins in PGA events. There is no bonus reduction of strokes for fast play; no style points for speed or walking form; no requirement to run between shots; and no penalty for moving up the fairway too slowly (although time limits apply once a ball is reached and before it is struck). The game is about skilled shot-making, not walking. What, then, is the fundamental alteration in allowing Martin a cart? One commentator has turned to a dictionary for guidance and observed,

> "[F]undamental" means "serving as, or being an essential part of, a foundation or basis." "Essential" means either "absolutely necessary; indispensable,"

23. Hence, cart use is not unknown in PGA events. Indeed, golfers who advance to the third stage of the Qualifying School become eligible for competing in either PGA Tour or Buy.com Tour (formerly Nike Tour) events, depending on their performance in that final stage. Thus, members of the golfing public who used carts in the early rounds of Qualifying School have become eligible to play in PGA events. Also, the PGA routinely lets players ride carts in certain situations "to save time." *Martin*, 204 F.3d at 1000. A player also can earn the right to play in a single PGA tournament by playing well in that week's qualifying event, where carts are permitted. In addition, and apparently without any impairment to the integrity of the competition, both the NCAA and the PAC 10 athletic conference allowed carts to accommodate Martin in college championships. *Martin*, 994 F. Supp. at 1248.

> or "a basic or necessary element." Walking a golf course is not a basic element necessary to the essential nature of professional golf.

Todd A. Hentges, *Driving in the Fairway Incurs No Penalty: Martin v. PGA Tour, Inc. & Discriminatory Boundaries in the Americans with Disabilities Act*, 18 LAW & INEQ. J. 131, 175 (Winter 2000) (footnotes omitted). The PGA has attempted to evade Title III by asserting that its walking rule is substantive, and therefore exempt. This argument ignores the statutory obligation to make reasonable modifications absent a fundamental alteration. Surely, Congress intended that a public accommodation's burden of "demonstrating" a fundamental alteration be more than merely labeling a matter as substantive.[24]

Casey Martin is extremely skilled at golf shot-making; he has proven that he can meet the general qualifications of the PGA; he just has a disability that limits his ability to walk. A simple accommodation of the use of a cart allows him to play the sport at the highest level, and does not alter the nature of the competition. There are many golfers who are *excellent* walkers, but who can only dream of playing golf with the skills of Jack Nicklaus, Tiger Woods, or Casey Martin. Unlike the PGA's stars, these fine walkers, but mediocre golfers, lack the shot-making skills that are the fundamental aspects of the game. In the words of one commentator:

> Of course Martin should get a cart. . . . Golf fans want to see golfers play golf. I've never heard

24. One wonders whether the PGA is more concerned with appearances. John Feinstein, although not a supporter of cart use, has observed, "The Tour didn't mind the idea of the over-fifty set tooling around in carts, but the idea of seeing players on the regular tour lurching down the fairways in carts was a disturbing one." JOHN FEINSTEIN, THE MAJORS 221 (1999). Feinstein also quoted Davis Love, a member of the PGA's Tour Policy Board, as follows: "Kind of sucks the drama out of the walk up eighteen if the guys come *riding* up, doesn't it? . . . We're going to lose in court, but we still have to fight the idea that riding is okay." *Id.* (emphasis in original). Love also reflected that cart use might "be okay for Casey because his case is unique, but it shouldn't be okay for anyone else." *Id.*

> anybody yet say, "Hey, let's go over to [hole] 9 and watch Seve walk! Fans don't care if a pro walks, rides or pogo-sticks to the next shot — they just want to see him hit it. . . . Martin isn't asking for any help playing the game. He's only asking for a lift to his ball. Golf isn't an obstacle course.

Rick Reilly, *Give Casey Martin a Lift*, SPORTS ILLUS., Feb. 9, 1998, at 140.

As the PGA observes, the District Court found that the PGA's walking rule has a "cognizable purpose" of injecting "the element of fatigue into the skill of shot-making." *Martin*, 994 F. Supp. at 1250. The PGA continues to decline to discuss, however, that after a six-day bench trial, the District Court found further that the fatigue factor involved in walking the golf course during PGA events "cannot be deemed significant under normal circumstances." *Id.* Also, from the outset, the PGA has glossed over and altogether ignored the District Court's findings regarding the *individual* aspects of Mr. Martin's disability: he endures substantial *additional* fatigue and significant pain associated with his disability *even when accommodated* with a cart. *See id.* at 1251-52 ("fatigue plaintiff endures just from coping with his disability is undeniably greater" than ordinary walking of the course; "plaintiff is in significant pain when he walks and even when he is getting in and out of the cart"). As emphasized by the Court of Appeals, "Even with a cart, Martin must walk about twenty-five percent of the course because the cart cannot be brought near to the ball in many cases." *Martin*, 204 F.3d at 1000. Given Martin's substantial fatigue and pain caused by his disability, he might have asked to be allowed to play only 9 of the requisite 18 holes, then multiply his score by 2. But, *that* would be a fundamental alteration of the sport — his score would not be based on shot-making over the full course. Instead, he has merely asked for the use of a cart to transport him between shots. Of course, the PGA never attempted to make an individualized inquiry; it refused to even consider his

individual disabling condition.[25] Instead, it posits that the walking rule is intended to make professional golf a contest of "physical performance." If that were truly the case, one would think that players would be directed to carry their own clubs, replace their own divots, rake sandtraps, and run between shots.

The PGA has also argued that cart-use will give Mr. Martin an advantage over other golfers. In making this assertion, the PGA apparently presumes that an able-bodied golfer, if permitted to use a cart, would have an advantage over other able-bodied golfers during a PGA tournament.[26] Even if a cart were to provide an advantage to another able-bodied golfer, the proper focus should be on whether the accommodation is a reasonable modification for the affected *individual* with the disability. The point of the ADA is to level the playing field for otherwise qualified individuals with disabilities. *Cf. Schmidt v. Methodist Hospital*, 89 F.3d 342, 344 (7th Cir. 1996) ("ADA is designed to level the playing field for . . . [individuals] who have one or more physical or mental disabilities"). A cart does not provide Casey Martin an advantage; it levels the playing field with able-bodied golfers by giving him the opportunity to compete.[27]

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25. A video of Martin's condition was introduced at trial. The District Court found it to provide "compelling evidence of the nature and extent of his disability." *Martin*, 994 F. Supp. at 1243. The District Court found this tape not only relevant, but "critical" to "[c]onsideration of the nature and extent of plaintiff's disability . . . [in] determining whether use of a cart affords him a reasonable accommodation under the circumstances presented." *Id.* at 1243 n.1.

26. Even this surmise is without foundation. Once the District Court ordered the PGA to permit Martin to use a cart during the 1997 Qualifying Tournament, the PGA allowed carts for all 168 competitors; however, only a handful chose to do so. If there had been an advantage, surely many more of the golfers would have seized the opportunity.

27. By way of analogy to the education field, a common accommodation for a student with a learning disability is to provide additional time for examinations. *See* Laura F. Rothstein, *Higher Education and Disabilities: Trends and Developments*, 27 STETSON

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The PGA also complains that to require it to adhere to Title III and make individualized inquiries would be burdensome. In this regard it also expresses concerns about players with bad backs and sore knees. The PGA overstates the potential burden. First, Title III has no application to a person who lacks a covered disability. Also, the number of golfers who will be able to overcome disabilities to achieve PGA-caliber performances may well be small. After all, such persons with disabilities must still demonstrate that they are "otherwise qualified." Finally, given that entities such as private colleges, medical, nursing, and law schools, and medical, nursing, and legal examining boards (per Title II), make such individualized inquiries every day in matters that arguably have far more societal impact than pro golf, the PGA's complaint rings hollow.

The PGA and its *Amici* have advanced "slippery slope" arguments that allowing a golf cart for Mr. Martin would result in changes to all pro sports. Such hypotheticals are largely misplaced. Many changes, such as moving basketball's three-point line or giving a swimmer a head start, would truly alter the actual competition. Indeed, some accommodations in golf might fundamentally alter the competition. For example, some persons with K-T Syndrome have the condition in their arm(s) or trunk. Their disability might keep them from being able to hit the ball very far, or even preclude their ability to swing the

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L. REV. 119, 123 n.19 (1997); *cf. McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 856-58 (5th Cir. 1993), *cert. denied*, 510 U.S. 1131 (1994) (finding accommodations such as extra examination time to be adequate, but rejecting additional requests for a part-time schedule and home-based exams). Thus, if a college accommodates a student with dyslexia by providing time and one-half for exams, that would be a typical accommodation to level the playing field for that student. Although the granting of extra time to a non-disabled student could well be an advantage, the same cannot be said with regard to the otherwise qualified student with dyslexia. Just like the cart for Mr. Martin, the extra time for the hypothetical student's reading disability simply offers an opportunity to compete.

golf club at all. For them, accommodation requests to tee the ball closer to the hole, to use a special golf ball, or to throw or roll the ball instead of stroking it with a club could constitute fundamental alterations of the PGA's competitions. As one commentator has observed, the "so-called slippery slope argument is tempting to trot out anytime a result like . . . Martin . . . is reached. . . . What this argument conveniently ignores is that much of the business of law is drawing lines. Judges are paid to do so, and they generally do it well." Tom D'Agostino, *Casey Martin Golf Cart Case About Fairness; ADA Not Con Artist's Tool*, ARIZONA REPUBLIC, March 9, 1998, at B5. Given that the PGA failed in its burden of demonstrating fundamental alteration as to *this* individual with a disability, the Court can resolve this case without needing to explore the full extent of Title III's reach.

The PGA has not demonstrated that allowing Mr. Martin to use a golf cart to accommodate *his* disability causes any fundamental alteration of its events. Professional golf is neither a speed sport, nor an endurance sport. The method by which the players get to the ball is largely irrelevant. Winning is based on the total number of strokes, not the method of moving about the course. The lower courts should be affirmed.

CONCLUSION

As Congress recognized in enacting the ADA, "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous . . . ." 42 U.S.C. § 12101(a)(9). In our society, the opportunity to *compete* in life is often reflected in the sports world. Americans love an underdog, an individual who can overcome adversity and strive to succeed against the odds. Members of the K-T Support Group and their children and loved ones afflicted with this rare and disabling condition have been inspired by Mr. Martin. They believe that if Casey is unwilling to give up in his quest for the "opportunity to compete on an equal basis" despite his condition, they can pursue dreams too — in any of life's many paths.

The overarching purpose of the ADA is to grant persons with disabilities the opportunity to participate fully in life, and not to be forced to the back rows or excluded entirely. Most PGA golfers started out as ordinary people who developed their shot-making skills to an extraordinary level. Mr. Martin also has developed his golf skills to an exceptional level; however, he simply cannot walk the whole golf course *because of a disability*. He should not be forced to the sidelines. Title III allows Mr. Martin the opportunity to compete on an equal basis with other PGA golfers – particularly given that the simple accommodation of providing *him* a cart does not fundamentally alter the sport.

The ADA is all about inclusion and opportunity. As stated by Jim Abbott, the Major League pitcher who competed and succeeded although he lacked a right hand, "As a society, we are so much better off with people like Casey Martin, who show us that heart is just as important as talent, who only want an opportunity to compete against the best in their profession. That is what this case is about." Jim Abbott, *It's Easy to Accommodate*, GOLF WORLD, Feb. 20, 1998, at 92.

The judgment of the Court of Appeals in this matter should be affirmed.

Respectfully submitted,

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